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No. 02-196

In the
Supreme Court of the United States

NATIONAL PARK HOSPITALITY ASSOCIATION,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR RESPONDENT XANTERRA PARKS & RESORTS, LLC SUPPORTING PETITIONER

STEVEN J. HARPER
HUGH J. TOTTEN
KIRKLAND & ELLIS
200 East Randolph Dr
Chicago, IL 60601

PAUL C. NIELSEN
XANTERRA PARKS
& RESORTS, LLC
900 N. Michigan Ave
Suite 1400
Chicago, IL 60611

ROBERT R. GASAWAY
Counsel of Record
ROBERT S. RYLAND
ASHLEY C. PARRISH
KIRKLAND & ELLIS
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

Attorneys for Respondent Xanterra Parks & Resorts, LLC

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The NPS cannot dispute that Congress has never delegated it authority to administer the CDA. Nor can it reasonably dispute that concession contracts are contracts for "the procurement of services," and many times, for "the procurement of construction, alteration, repair or maintenance of real property." 41 U.S.C. § 602(a). The NPS's inability to respond to these points is dispositive.

Instead of addressing the CDA's plain language or responding meaningfully to the fundamental arguments made in the opening briefs, the Government sows confusion. What is perhaps most startling is how much of the Government brief is newly-minted. Documents never disclosed in the district court or court of appeals now appear as lodged materials. Arguments never made to, nor accepted by, either of the lower courts have come to the fore. And tangential statutes and remote congressional testimony, never cited in earlier stages of this litigation, nor relied on or even mentioned in either the NPS regulations or their preamble, are suddenly glued together to form a setpiece of supposed background understandings and limits on CDA applicability.

On examination, this tissue of diversionary information disintegrates. The Government, in the end, can find no reason why this Court should allow the NPS to fashion clever devices for exempting itself from the CDA and depriving its contractors of the rights and procedures the CDA guarantees. As explained in our opening brief, and in the NPHA's briefs, the NPS regulation declaring concession contracts CDA-exempt is invalid because it is made without delegated authority, and is fundamentally at odds with the plain meaning of the CDA itself. If accepted, the NPS's approach would pose mortal dangers not just to NPS concessions or businesses with government contracts, but to anyone who relies on federal statutes to protect their relationships with government agencies.

ARGUMENT

I. THE NPS REGULATIONS SHOULD BE VACATED BECAUSE THE NPS HAS NO AUTHORITY TO ADMINISTER THE CDA

For reasons explained in our opening brief, an administrative agency's power "is no greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986). Accordingly, because Congress has not given authority to the NPS to administer the CDA, the NPS may not issue binding regulations declaring concession contracts exempt from the CDA. *See* 5 U.S.C. § 706(2)(C). The Government nonetheless would ignore this dispositive point, responding only in a footnote. *See* NPS Br. 15 n.6. There, the Government suggests that the NPS regulation should be upheld as an "interpretive rule." *Id.*

This argument is fundamentally at odds with the understandings on which the NPS regulation rested when it was promulgated by the agency and defended in the courts below. The regulation, as promulgated, bears all the hallmarks of a substantive rule of binding, legal effect. It was published, together with dozens of other binding NPS rules, in the Code of Federal Regulations, which by statute contains only documents having "general applicability and *legal effect*." 44 U.S.C. § 1510 (emphasis added); *see also* 1 C.F.R. § 8.1 (same). The regulation also is further incorporated as a non-negotiable and binding term in every concession contract. *See* 36 C.F.R. § 51.1 ("All concession contracts are to be consistent with the requirements of this part"); 65 Fed. Reg. 26,051, 26,065 (2002) ("This CONTRACT . . . [is] subject to all Applicable Laws"); 65 Fed. Reg. 44,894, 44,899 (2000) (same). No reasonable observer could have guessed at the time of promulgation that this particular regulation, as opposed to the sundry NPS

regulations published simultaneously and alongside, would later be defended as a mere, non-binding, "interpretive rule."

Moreover, in the courts below, the NPS vigorously contended that its regulation is legally binding. In particular, the NPS argued that its regulation is entitled to *Chevron* deference. *See* NPS D.C. Cir. Br. 48, 50. The Government now distances itself from that untenable position, but its new rationale was never invoked by the agency itself and, thus, provides no grounds for this Court to decide in favor of upholding the regulation. *See SEC v. Chenery Corp.* , 332 U.S. 194, 196 (1947); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

It bears mention that Xanterra has no quarrel with the notion that agency communications with the public are salutary. The NPS may at any time issue informal interpretive guidance—regarding CDA applicability or any other topic—via memoranda, website postings, *Federal Register* notices, or other means that create no implication that the agency is engaged in *making law*. But this NPS regulation, like every regulation, bears no resemblance to those sorts of non-binding interpretations. *See Thomas v. New York*, 802 F.2d 1443, 1446-47 (D.C. Cir. 1986) (Scalia, J.) (distinguishing substantive rules from interpretations, statements of policy, and rules of agency organization); *see also Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986) (Scalia, J.). To the contrary, the regulation reflects the NPS's final, binding, categorical, and codified judgment that "[c]oncession contracts are not contracts within the meaning of [the CDA]." 36 C.F.R. § 51.3.

The Government suggests, to be sure, that not it but the D.C. Circuit first deemed its regulation an "interpretive rule" by declining to afford *Chevron* deference. *See* NPS Br. 16

n.6. But this also cannot be true. An "agency interpretation *contained in a regulation*" must be evaluated under "the framework of deference set forth in *Chevron*." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (emphasis added). Accordingly, given that this particular legal interpretation appears in the Code of Federal Regulations, the D.C. Circuit had but two choices—afford *Chevron* deference, or vacate as *ultra vires*.

As we explain in our opening brief, the D.C. Circuit's failure to appreciate this dichotomy is especially surprising. Prior to the decision below, that court had successfully applied this Court's precedents to invalidate codified regulations promulgated in an absence of delegated authority. *See, e.g., Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002); *Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994). Although the Government now asserts the irrelevance of those decisions (on grounds they involved "legislative regulations claimed to have the force of law," NPS Br. 16 n.6), in fact, the D.C. Circuit decision in *Kelley* expressly addressed—and rejected—the Government's precise argument here: that a codified agency regulation could be "sustained as an interpretive rule." 15 F.3d at 1108. In the absence of serious responsive analysis from the Government, this Court should take the same action—and vacate the NPS regulation as *ultra vires*.

II. THE NPS REGULATIONS ARE CONTRARY TO THE CDA'S PLAIN TERMS

Besides being *ultra vires*, the NPS regulation also reflects an impermissible construction of the CDA. The Government brief has no rejoinder on this point, elaborated on in both our opening brief and the NPHA's briefs, as it pays almost no heed to the CDA's actual language. The Government instead attempts to erect new doctrinal barriers

to judicial scrutiny, arguing that a facial challenge to the NPS regulation must fail if even one concession contract falls outside the CDA's scope. Likewise, the Government asks the Court to rewrite the CDA to include new, court-fashioned limitations. Both of these attempts to undermine the CDA should be rejected.

A. The "No Circumstances" Test Does Not Apply

From the first pages of its brief, the Government attempts to change the nature of this case. It reformulates the Question Presented to emphasize that this case involves a *facial* challenge, *see* NPS Br. (I), and then argues that, to prevail on a facial challenge, the NPHA and Xanterra "must establish that no set of circumstances exists under which the [regulation] would be valid." NPS Br. 33.

The NPS has never made this argument before—not in the administrative record, not in the district court, not in the court of appeals, and not in opposition to the NPHA's petition for certiorari. Indeed, the NPS has never admitted before now that *any* NPS concession contract might in fact fall within the CDA's scope. To the contrary, although Xanterra specifically raised an as-applied challenge to the NPS regulations as unlawful under the CDA, the Government did not differentiate in the lower courts between Xanterra's as-applied challenge and the NPHA's facial challenge. Instead, the NPS defended both challenges on the same grounds, taking the unbending position that concession contracts, *without exception*, "are not contracts within the meaning of" the CDA. 36 C.F.R. § 51.3; *see also* 65 Fed. Reg. 20,630, 20,635 (Apr. 17, 2000). Because this new argument now being pressed—that the NPS regulation should be upheld so long as one concession contract might fall outside the CDA's scope—was not "invoked by the agency," this Court is "powerless to affirm" on this basis.

SEC v. Chenery Corp. , 332 U.S. 194, 196 (1947); *see also SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

By pressing this newly-minted argument, moreover, the Government repudiates not only positions it took below, but also the D.C. Circuit's decision in its favor. The D.C. Circuit used a bold, aggressive (and fundamentally flawed) application of the "no circumstances" test set forth in *United States v. Salerno*, 481 U.S. 739 (1987), to reject facial challenges made by the NPHA and Xanterra to *other* NPS regulations challenged alongside the regulation governing CDA applicability. *See* Pet. App. 10a-14a; *see also National Mining Ass'n v. Army Corps of Eng'rs*, 145 F.3d 1399, 1407 (D.C. Cir. 1998). Despite its willingness to apply the "no circumstances" test to other challenges in the same case, however, the D.C. Circuit did *not* apply *Salerno* to the CDA challenge. *See* Pet. App. 27a-29a. It instead weighed that challenge without any reference to whether it was facial or as-applied.

The Government never explains its repudiation of the D.C. Circuit's decision in its favor, but instead cites dicta in *Reno v. Flores* stating that the "no circumstances" test applies to both constitutional and statutory challenges. *See* 507 U.S. 292, 301 (1993). But this dicta is taken out of context. *Reno* in fact reaffirms the principle, firmly grounded in doctrines of standing and ripeness, that a reasonable agency regulation should not be struck down merely because a petitioner "can point to a hypothetical case in which the rule might lead to an arbitrary result." *American Hosp. Assoc. v. NLRB*, 499 U.S. 606, 619 (1991); *see also INS v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991). *Reno* does not, as the Government would have it, turn this established principle on its head: The mere fact that an agency can point to a

hypothetical case in which its rule might be valid should not and does not shelter an unlawful regulation from facial invalidation. Indeed, *Reno* itself proves this point. *Reno* did not uphold the challenged regulation based on grounds of some failure to show invalidity in all circumstances. Instead, this Court applied normal administrative law principles, finding that the regulation had a "reasonable foundation" and "rationally pursue[d] a purpose that [was] lawful for the INS to seek." *Reno*, 507 U.S. at 309.

The *Reno* approach follows well-trodden paths taken by this Court in other cases involving APA challenges to agency regulations. In *Sullivan v. Zebley*, 493 U.S. 521 (1990), for example, the Court upheld a facial challenge to agency regulations, even though the regulations were clearly valid in some applications. Notably, the district court in *Zebley* had taken the contrary approach, holding that "errors in applying the regulations in some cases do not demonstrate invalidity of the regulations themselves." *Zebley v. Heckler*, 642 F. Supp. 220, 222 (E.D. Pa. 1986). This Court, by contrast, struck down the regulations as "manifestly contrary to the statute," despite the fact that more carefully drawn regulations might have validly regulated some of the same conduct. *Zebley*, 493 U.S. at 541.

Likewise, *Rust v. Sullivan*, 500 U.S. 173 (1991), considered a facial challenge on both constitutional and administrative law grounds to a Department of Health and Human Services regulation. Although the Court stated that "an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available," *id.* at 190, it did not apply the same "no circumstances" test to "petitioners' contention that the regulations exceeded the Secretary's authority under Title X and are arbitrary and capricious." *Id.* at 183. There, it

applied *Chevron*. The Court must have recognized, as the D.C. Circuit has correctly observed, that "the normal *Chevron* test is not transformed into an even more lenient 'no valid applications' test just because the attack is facial." *National Mining Assoc.*, 145 F.3d at 1407.

As *Rust* vividly illustrates, there is a fundamental difference between, on the one hand, a constitutional challenge to a statute or regulation, and, on the other, a challenge to agency regulations under the APA. In the constitutional context, "[d]ue respect for the decision of a coordinate branch of Government demands that [the Court] invalidate a congressional enactment only upon a plain showing that Congress exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000). This "general rule reflects two 'cardinal principles' of our constitutional order: the personal nature of constitutional rights and the prudential limitations on constitutional adjudication." *Los Angeles Police Dept. v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999). This same due respect for Congress requires a much different approach, however, when regulations are challenged as contrary to law under the APA. In the APA context, the Court must test regulations against traditional administrative law doctrines to ensure that the agency is properly abiding by Congress's commands, not subverting them through unlawful or arbitrary regulations. *Cf. Chenery*, 318 U.S. at 94 (an agency "order may not stand if the agency has misconceived the law").

Under general administrative law principles, it is not enough that an agency regulation *might* be valid in some circumstances. While "the Court has never insisted" that Congress "articulate its reasons for enacting a statute," *United States R.R. Retirement v. Fritz*, 449 U.S. 166, 179 (1980), in the administrative context, the burden is squarely

on the agency to justify its regulations and to "clearly disclose and adequately explain[]" the grounds on which the agency acted. *Chenery*, 318 U.S. at 94. As the Court has emphasized, the agency itself must "examine the relevant data" and "articulate a *satisfactory explanation* for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Assoc. v. State Farm*, 463 U.S. 29, 43 (1983) (emphasis added). Reasoned decisionmaking requirements are thus fundamentally inconsistent with the "no circumstances" test suggested by the NPS.

The Court should accordingly take this opportunity as an occasion to remind lower courts that a "no circumstances" test does not apply where, as here, an agency's regulations are directly challenged under the APA as contrary to law. In this regard, the Court should note that the NPHA and Xanterra are not challenging specific actions that the NPS might take pursuant to its regulation—but rather the unlawful contours of the legal categories the regulation creates on its face.

B. Concession Contracts Are Subject To The CDA Because They Are Contracts With An Executive Agency For Procurement Of Visitor Services

To ensure that government contractors have the same fundamental rights as parties involved in private contract disputes, the CDA applies to "any" contract entered into by "an executive agency" for "the procurement of services," or the "construction, alteration, repair or maintenance of real property." 41 U.S.C. § 602(a). The Government attempts to avoid this plain language by narrowly defining the term "procurement." But for reasons set forth in the NPHA briefing, "procurement," as used in the CDA, easily encompasses contracts, such as NPS concession contracts,

that are the result of government solicitation, reduced to writings signed by both parties, and deemed by law as "necessary" to the fulfillment of the agency's mission. *See* 16 U.S.C. § 5951(b). The NPHA rightly emphasizes that NPS concession contracts constitute critical procurements (for CDA purposes) because of the NPS's reliance on them in carrying out its statutory mandate. *See* NPHA Reply 16.

The Government nonetheless continues to argue that concession contracts are mere permits, not "contracts" for "the procurement of services." NPS Br. 29. Likewise, the Government argues that concession contracts are exempt from the CDA because they are not executed for the government's direct benefit and use. For reasons stated in the NPHA briefing and those that follow, however, these distinctions are fanciful. Nothing in the Government brief can overcome Congress's clear command that the CDA applies "notwithstanding any contract provision, regulation, or rule of law to the contrary." 41 U.S.C. § 609(a)(1).

1. Concession Contracts, Unlike Permits, Generally Impose Affirmative Performance Obligations

Concession contracts—unlike permits—are affirmatively solicited by the NPS, subject to pervasive government oversight, and take the form of binding, bilateral contracts. In most cases, concession contracts also impose affirmative obligations to provide services. *See* Xanterra Br. 22. The current contract for concession services at the Grand Canyon is one example in that it, like most concession contracts, is far removed from the type of "permit" that the NPS would have the Court believe is the norm. The NPS not only *requires* Xanterra to provide the visitor services described on page 22 of the NPHA's opening brief, but is intimately

involved in almost every aspect of Xanterra's business operations. Xanterra must receive prior NPS approval for the services and merchandise it offers, and any promotional materials it uses. *See* Grand Canyon Contract § 3(d) (JA 77). Xanterra also must allow its employees to participate in certain NPS-designated volunteer programs; obtain NPS sign-off on the "design, artwork, layout, and selection of menu items;" and even seek prior NPS approval for the faceplates and color of its vending machines. *See id.* at 27-32

Performance of these obligations is mandatory. The NPS has authority under the contract to require Xanterra to "furnish appropriate forms of bonds" in order to ensure that Xanterra lives up to its contractual obligations. *See* Grand Canyon Contract § 13(a) (JA 104); *see also* 65 Fed. Reg. at 26,071. Should Xanterra fail to perform, Xanterra is required to pay "all damages or claims that may result," and the NPS has "at all times the first lien" on Xanterra's assets within the park. Grand Canyon Contract § 13(b) (JA 104-105); *see also* 65 Fed. Reg. at 26,071. Moreover, failure to perform to the NPS's satisfaction is grounds for termination at the NPS's sole discretion. *See* Grand Canyon Contract § 16(b) (JA 108).

In addition to requiring performance, the NPS has insisted that standard terms be included in Xanterra's contract for purposes of leaving an avenue for the NPS to assert that it may require Xanterra to undertake new performance obligations during the course of the contract. The Grand Canyon Contract is subject not only to NPS requirements, regulations, and policies "now in force," but also any requirements, regulations, or policies that may be implemented "in the future." Grand Canyon Contract §§ 2, 5 (JA 69, 80); *see also* 65 Fed. Reg. at 26,063. Under the

Contract, the NPS "reserves the right to determine and control the nature, type and quality" of visitor services. Grand Canyon Contract § 3(d) (JA 77); *see also* 65 Fed. Reg. at 26,064. According to the NPS, it may also, in its discretion, make modifications to the contract's Operating and Maintenance Plans. *See* Grand Canyon Contract § 3(c) (JA 76-77); *see also* 65 Fed. Reg. at 26,064.

Accordingly, because many NPS concession contracts, including Xanterra's, contain minutely detailed, pervasively policed, affirmative obligations, those contracts bear no relation to a permit or license. A permit-holder—unlike these NPS concessioners—has no affirmative obligation to perform; to the contrary, performance is entirely within a permit-holder's discretion.

2. Concession Contracts Provide Direct Benefits To The NPS

The Government also argues that in order to be covered by the CDA, a contract must be "by and for the direct use and benefit of the federal government." NPS Br. 27. As explained in the NPHA briefing, there is no basis for this extra-textual limit on CDA applicability. *See* NPHA Reply 11-15. The Government has not (and cannot) point to any language in the CDA supporting this inventive interpretative position.

Even assuming that the CDA could be rewritten to apply only to contracts "for the direct benefit of the government," however, NPS concession contracts clearly satisfy that test. The NPHA rightly emphasizes the NPS's affirmative, statutory obligation to provide visitor services. *See* NPHA Reply 16. Likewise, the millions in franchise fees paid annually to the government by concessioners were highlighted in our opening brief. *See* Xanterra Br. 27-28.

But further examples of benefits are also easy to identify. Under the Grand Canyon Contract, for example, Xanterra is required to provide reduced rates for lodging and transportation for Government employees. *See* Grand Canyon Contract § 3(f)(2) (JA 78). It also must maintain and provide staffing for a Recreation Center used by Xanterra and NPS employees (not the public) for dances, sports activities, fitness programs, computer access, movies and tape rentals. *See* Grand Canyon Contract, Operating Plan at 13. Finally, as we noted before, Xanterra is required to make approximately $8.5 million in improvements to buildings and structures inside national park boundaries. All of these mandatory activities inure directly to the benefit of the NPS and its employees.

3. The NPS Should Not Be Permitted To Deprive Concessioners Of The CDA's Essential Protections

Congress recognized that agencies, like the NPS, would have strong incentives to impose affirmative obligations on government contractors, either for their benefit, for the benefit of their employees, or for the benefit of others, such as national park visitors. Congress also recognized that, in imposing these obligations, agencies would often face the temptation of unfairly shifting costs onto their contracting partners. Congress thus gave clear statutory protection to the businesses from which the government procures services and construction, making clear that the CDA's protections apply "notwithstanding any contract provision, regulation, or rule of law to the contrary." 41 U.S.C. § 609(a)(1).

As we explained in our opening brief, because NPS concession contracts are subject to pervasive NPS oversight, and because the NPS may well attempt to impose new performance obligations on concessioners over the life of a

contract, it is not unusual for factual disputes to arise over questions of performance. It is precisely for this reason that the CDA's due process protections and uniform procedures are critically important. *See* Clarence Kipps, Tom Kindness, and Cameron Hamrick, *The Contract Disputes Act: Solid Foundation, Magnificent System*, 4 Pub. Contract L.J. 585, 591-96 (1991) (discussing the CDA's "carefully balanced system for resolving disputes"). The NPS disputes this point, arguing that, even if the CDA does not apply, concessioners will still have their day in court. *See* NPS Br. 39. But this would send NPS contracting back to the archaic pre-CDA era, in which concessioners were largely deprived of (among other things) prejudgment interest, *see* 41 U.S.C. § 611, *de novo* review of agency contracting decisions before independent tribunals, *see id.* § 609(a)(3), and access to accelerated procedures for resolving smaller claims, *see id.* § 608.

Indeed, as the Government is forced to concede, the availability of prejudgment interest is central in a contracting regime, like the NPS's, in which one party is not entitled to refuse performance in response to additional demands made by the government. The Government thus admits that Congress intended that government contractors should recover prejudgment interest if they are contractually required "to perform the work as directed by the government without stopping to litigate." NPS Br. 38 (quoting *Report of the Commission on Government Procurement* (1972)). The reasons for this policy are set forth in the Government brief:

> Since the contractor has been compelled to perform the work with its own money . . . there can be no equitable adjustment to the contractor until the contractor recovers the entire cost of the additional work. The cost of money to finance this additional work while pursuing the administrative remedy, normally called interest, is a legitimate cost of performing the additional work.

Id. at 38-39. This policy is clearly applicable to the world of NPS concession contracting. NPS concessioners may be, and often are, "compelled to perform" under their contracts while a dispute simmers over NPS demands for more benefits or services, or changes to existing benefits or services. In such situations, the Government appears to recognize that "there can be no equitable adjustment" until the concessioner "recovers the entire cost of the additional work," including prejudgment interest. The CDA thus ensures that the NPS cannot prevent concessioners from fully recovering the true costs of complying with NPS-imposed performance obligations.

Equally important, were this Court to accept the Government's invitation to return NPS contracting to the pre-CDA era, the NPS would again be able to "circumscribe . . . access" to courts. S. Rep. No. 95-1118, at 5 (1978). Because the "methods and forums for handling" concession contract disputes might once again become mostly a matter of "executive fiat," *id.* at 2, the NPS might well decide to replace the IBCAs with agency officials as the arbiters of concession disputes, and adopt dispute resolution procedures wholly lacking "the procedural safeguards and other elements of due process that should be the right of litigants." *Id.* at 4. Instead of *de novo* review in an independent forum, decisions would likely be reviewable only under the deferential "arbitrary and capricious" standard. *See* Kipps. *et al.*, *The Contract Disputes Act*, 4 Pub. Contract L.J. at 591 (the CDA was designed to "release[] contractors from the limited confines of administrative law").

Allowing the NPS to circumvent the CDA would therefore not only contradict Congress's express intention that the CDA should apply "notwithstanding . . . any regulation . . . to the contrary," 41 U.S.C. § 609(a)(1), but also, more fundamentally, pose wider dangers to the CDA's usefulness as the answer to agency overreaching.

III. THE NPS HAS NO LEGITIMATE REASON FOR EXEMPTING CONCESSION CONTRACTS FROM THE CDA

The Government tries to cover its lack of meaningful responses to the opening briefs with a single (and easily unmasked) textual argument, a mantle of new citations to newly-invoked statutes, and unreliable legislative history. The purpose of these side discussions may be to distract attention from the CDA's plain meaning and sow confusion in its stead.

Before addressing these diversions, it bears mention that the Government's advocacy in this case has been unusually evasive. An example is the over 90 pages of extra-record materials lodged by the NPS. At earlier stages of this litigation, the NPS resisted discovery on the grounds that it had already provided the *entire* administrative record. It accordingly should not be permitted now, at this late date, to rely on documents that it has never before disclosed or relied on. *See* S. Ct. R. 32 (limiting a party's right to lodge non-record materials) The NPS brief also contains an unsettling quantity of miscitation and selective quotation. Numerous examples are identified above and in the NPHA's reply brief. *See* NPHA Reply 9 n.11 (misuse of phrase); *id.* 10 n.13 (misleading quote); *id.* 11, 13 (selective quotations); *id.* 13 n.17 (misleading description). Taken together, these examples provide a clear warning that the Court should turn

a wary eye to each and every contention made by the Government.

A. The CDA Does Not Require Payment Of Government Funds

When the Government places substantial reliance on CDA text—for the one and only time—it observes that reimbursements to the Judgment Fund for monetary awards are paid out under the CDA "by the agency whose appropriations were used for the contract." NPS Br. 19 (quoting 41 U.S.C. § 612(c)). Based on this text, the Government asserts that "only contracts involving the payment of government funds constitute 'procurement'" for CDA purposes. *Id.*

As the NPHA explains, however, the Government quotes selectively—the CDA in fact states that reimbursements must be made "by the agency whose appropriations were used for the contract out of available fund *or by obtaining additional appropriations for such purposes*." 41 U.S.C. § 612(c) (emphasis added). When the CDA is quoted in full, the Government's argument falls apart. *See* NPHA Reply 11. Indeed, because the CDA applies to contracts for "the disposal of personal property," 41 U.S.C. § 602(a)(4), it is clear that, notwithstanding the Government's unfounded assertions, Congress expressly intended the CDA to apply to a whole category of government contracts under which the government is *receiving payment*, rather than *making payment*. In contracts for disposal of personal property, similar to NPS concession contracts, funds flow in one direction—into government coffers, not out of them. Nonetheless, the CDA's plain language makes clear that the CDA applies to such contracts, notwithstanding the Government's repeated insistence that the government must *pay* in order for the CDA to apply.

B. Other Procurement Laws Do Not Necessarily Apply To NPS Concession Contracts

As we noted before, the Government quickly retreats away from any statutory text and into an extended, confusing argument by analogy that invokes over a half a century of government procurement law. The Government argues at bottom that it would be "untenable" to apply the CDA to concession contracts because concessioners are not "subject to *any other* government procurement law." NPS Br. 20.

These *other* procurement laws are, of course, not before the Court. Even if they were, however, the Government's extended reliance on *other* procurement law must fail. Unlike the CDA, other procurement-related statues apply largely to the solicitation, bidding, and formation of government contracts. But significantly, the Concessions Management Improvement Act of 1998 ("1998 Act") sets forth a comprehensive and reticulate scheme specifically governing the solicitation, bidding, and formation of NPS concession contracts. *See* 16 U.S.C. § 5952(1) (competitive selection process); § 5952(2) (solicitation of proposals); § 5952(3) (issuance of prospectus); § 5952(4) (minimum bid requirements); § 5952(5) (criteria for contract award). Hence, the 1998 Act displaces many or all of the generally applicable statutes that would otherwise apply. *See Chamber of Commerce v. Reich*, 74 F.3d 1322, 1333-39 (D.C. Cir. 1996) (canvassing this Court's precedents and finding that a Procurement Act Executive Order was displaced by the National Labor Relations Act); *see also Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 702 (1989) (noting the "general principle that a precisely drawn, detailed statute pre-empts more general remedies").

The CDA (unlike other procurement statutes) governs dispute resolution, an area of government contracting not

comprehensively addressed in the 1998 Act. Accordingly, although the 1998 Act may well displace other procurement laws, Congress has not chosen to displace the CDA or other generally applicable dispute resolution statutes. Indeed, the NPS has already conceded that the other notable, generally applicable dispute resolution statute, the Administrative Disputes Resolution Act, applies to NPS concession contracts. *See* 66 Fed. Reg. 35,082, 35,082 (2001) (clarifying that neither the NPS regulations nor Standard Concession Contract are exempt from the ADRA). It is not "untenable," as the Government suggests, to treat the CDA differently from other procurement laws; it is exactly what Congress intended.

C. The Post-CDA Legislative History Relied On By The NPS Is Irrelevant

The Government brief closes with a discussion of legislative history. For reasons explained in our opening brief, whatever role legislative history might ordinarily play in statutory interpretation, orphaned statements planted in the 1998 Act deserve no weight. *See* Xanterra Br. 28-30. The Government argues that the legislative history "reflect[s] Congress's conscious design . . . that the Act and regulations issued thereunder *alone* governed concession contracts." NPS Br. 49. The Government thus argues that legislative silence as to the NPS's view that concession contracts are not subject to the CDA "ratified that understanding." *Id.* But there is no support for this view. *See Brown v. Gardner*, 513 U.S. 115, 121 (1994) (when "the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction").

Indeed, if legislative history is relevant at all, it supports the NPHA and Xanterra, not the NPS. It is indisputable that Congress knew how to exempt NPS concession contracts

from other statutes, *see* 16 U.S.C. § 5962, but nonetheless did not address the CDA in the 1998 Act. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (when Congress knows how to make its intent explicit, the absence of express authorization weighs heavily against finding that any authorization was granted). And if, as the Government argues, Congress was aware of the NPS's long-standing attempts to break free from the CDA, then, by this same logic, it must also have been aware of the binding decisions that nonetheless kept the NPS tethered to its CDA obligations. *See, e.g., Watch Hill Concessions, Inc.*, No. 4284-2000, 2001 WL 170911, *6 (IBCA Feb. 16, 2001); *National Park Concessions, Inc.*, No. 2995, 1994 WL 462401 (IBCA Aug. 18, 1994); *see also Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Against this backdrop, Congress's failure to pass legislation overturning these binding decisions (which had rendered the NPS's contrary view a dead letter) is further evidence that "the Committee's report language was merely an accommodation to NPS." *Watch Hill*, 2001 WL 170911, at *6; *see also Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381-82 n.11 (1969) ("unsuccessful attempts at legislation are not the best of guides to legislative intent").

CONCLUSION

For these reasons, as well as those set forth in our opening brief and the NPHA's briefs, this Court should hold that the CDA applies to concession contracts, reverse the judgment of the court of appeals, and vacate the NPS's regulations.

Respectfully submitted,

STEVEN J. HARPER
HUGH J. TOTTEN
KIRKLAND & ELLIS
200 East Randolph Dr
Chicago, IL 60601

PAUL C. NIELSEN
XANTERRA PARKS
& RESORTS, LLC
900 N. Michigan Ave
Suite 1400
Chicago, IL 60611

ROBERT R. GASAWAY
Counsel of Record
ROBERT S. RYLAND
ASHLEY C. PARRISH
KIRKLAND & ELLIS
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

Attorneys for Respondent
Xanterra Parks & Resorts, LLC

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